Studley Case this additional element was not present and the distinction is all important.

The Massey Case and the Studley Case are the two leading cases on the topic under discussion, and the foundation of all the decisions, though there is some dissent among the authorities. The Ernst Case completes the range of the authorities, and is typical of that group of cases, the facts of which present all the elements of a voidable preference.[16]

The discussion gives rise to an interesting case where the depositor is not indebted to the bank except on an overdrawn account. The debtor, while insolvent and within the four months period, deposits in the usual course of business a sufficient sum to cover the overdraft. Upon a subsequent adjudication will the bank be compelled to surrender the amount deposited, as a preference under § 60b? It seems there should be no distinction between this case and those cases discussed above, where the bank held an overdue note. The same reasons apply and the result should not be different.[17]

NATURE OF THE LIABILITY OF INDIVIDUAL PARTNERS FOR PARTNERSHIP TORTS.*—It is a well settled rule in England that upon administration in court of partnership estates and estates of the individual partners, the individual creditors are preferred over

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[16] See 14 MICH. LAW REV. 147, for comparison of Chisholm *v.* First Nat. Bank (Ill.), 109 N. E. 657, 35 A. B. R. 598, and Knoll *v.* Commercial Trust Co. (Pa.), 94 Atl. 750, 35 A. B. R. 379. In the discussion of the Illinois case in 10 ILL. LAW REV. 602, 610, it was said, "The facts of the Studley Case square with the principal case in all essential points except that the bank receiving the checks in the Studley Case did not have reason to believe, etc. This element as we think presents a fatal distinction. The precise point here under discussion was decided a few months earlier than the principal case by the Supreme Court of Pennsylvania with a contrary conclusion in Knoll *v.* Commercial Trust Co., 94 Atl. 750, 35 A. B. R. 379 (Apr., 1915). The Pennsylvania court bases its conclusion on Traders' Bank *v.* Campbell, 81 U. S. (14 Wall.) 87, which arose under the statute of 1867, and finds the rule there stated concordant with the rule of the *Studley* case, the element of knowledge being the decisive factor." In Traders' Bank *v.* Campbell, 81 U. S. (14 Wall.) 87, the transaction presented all the elements of a voidable preference. This case is distinguished in the Massey Case, and followed by In re Starkweather & Albert (D. C.), 206 Fed. 797, where the circumstances showed a deposit with the specific purpose of payment. In addition to the cases cited in the notes above, supporting the principles outlined in the text, see Toof *v.* City National Bank, 206 Fed. 250, 30 A. B. R. 79; National City Bank *v.* Hotchkiss, 231 U. S. 50, 31 A. B. R. 291; Continental & Commercial T. & Sav. Co. *v.* Chicago Title & T. Co., 229 U. S. 435. But see *contra*, In re National Lumber Co., 212 Fed. 928, 32 A. B. R. 388. See Putnam *v.* U. S. Trust Co., *supra;* Wilson *v.* Citizens' Trust Co., *supra.* See also, the discussion of the reasonable cause to believe, in the recent case of German-American State Bank *v.* Larimer (C. C. A.), 235 Fed. 501 (1916).

[17] See Chisholm *v.* First National Bank, *supra;* Tomlinson *v.* Bank of Lexington, *supra.*

*See note, 1 VA. LAW REV. 135.

partnership creditors in the distribution of individual assets.[1] This is also the generally accepted doctrine in this country;[2] but in a few states it has been disapproved and the more reasonable rule adopted allowing partnership creditors to share *pari passu* with individual creditors in the separate assets, after exhausting partnership assets.[3]

An important exception, if sound, to the majority rule above indicated is established by the decision in *Re Peck*,[4] where Chase, J., following the decision in *Re Blackford*,[5] lays down the rule that a creditor with a judgment against a partnership for conversion may share *pari passu* with separate creditors in the distribution of the individual estates of the partners, and also equally with partnership creditors in the distribution of partnership assets. His opinion is based on the ground that a tort claim against a partnership is both joint and several, and, therefore, should be governed by the same rules governing joint and several contract claims.[6]

The learned judge fails to draw the distinction between the nature of a joint *and* several contract claim, and the peculiar character of a tort claim which is joint *or* several. This distinction is clearly pointed out by Brown, J., in *Reynolds* v. *New York Trust Co.*,[7] in considering precisely the same point, but arriving at a directly opposite conclusion. A tort committed by several may be

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[1] Ex parte Elton, 3 Ves. Jun. 238. See Lodge *v.* Prichard, 1 De G. J. & S. 610.

[2] Murrill *v.* Neill, 8 How. 414, giving an excellent statement of the reasons for the rule. Hundley *v.* Farris, 103 Mo. 78, 15 S. W. 312, 23 Am. St. Rep. 863, 12 L. R. A. 254.

[3] Robinson *v.* Surety Co., 87 Conn. 268, 87 Atl. 879, strongly repudiating the majority view and enunciating with equal force the soundness of the reasoning supporting the minority view. See also, Pettyjohn *v.* Woodruff, 86 Va. 478, 10 S. E. 715.

[4] 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223.

[5] 35 App. Div. 330, 54 N. Y. Supp. 972.

[6] Chase, J., quotes at great length from the opinion in Re Blackford, *infra*. In considering this subject, he quotes, "Nor do we see that the liability of joint tort feasors is different from that of parties to a contract by which, under its express terms, they become jointly and severally bound." This seems to be the basis of his decision, the double proof of joint and several contract claims being conceded as an established legal principle.

[7] 110 C. C. A. 409, 188 Fed. 611, 26 A. B. R. 698, where Brown, J., says: "The liability of one of several tort feasors is not both joint and several, but is joint or several at the election of the plaintiff. The plaintiff may have judgment against one or more, but he may not have two judgments against the same person on the same transaction * * *

"A joint judgment is a bar to a several action, and a several judgment to a joint action.

"At law, therefore, one whose goods were converted by partners could not have both a joint and several judgment, but could have either at his election * * *

"It seems impossible that the [plaintiff] should have greater rights before judgment than if it had proceeded to judgment.

"* * * we are unable to accept the proposition that joint tort feasors are jointly and severally liable, if by this is meant subject to both joint and several judgments."

treated as joint or several at the election of the plaintiff;[8] but he can obtain only one judgment against any defendant. A joint judgment is a bar to a several action and a several judgment to a joint action. There is but one right, which may be enforced in either of the two ways but not both.[9] A joint and several contract, however, gives rise to two distinct rights of action, there being two separate obligations, one of the parties jointly and another of the parties as individuals. A stock illustration of this is where one of several partners becomes surety on a partnership note. He thereby incurs a joint liability as a member of the partnership and a separate liability by reason of his individual undertaking of suretyship.[10] In such case, since there are two distinct rights, both may be enforced; and it follows, as a matter of course, that both may be proved—one against the partnership estate and the other against the individual estate of the surety. While it is true that, upon a joint judgment against several persons for a tort, execution may be issued against and satisfaction had from any one, all or any intermediate number;[11] yet this does not give separate rights: it is merely a matter of remedy. In this respect, it is not unlike a judgment obtained on an ordinary contract claim against a partnership, which is in its nature always joint.[12] It is for the dealing with just such claims that the rule of marshalling, giving priority to individual creditors over partnership creditors in the distribution of separate assets, was established.

It is believed that the doctrine enunciated by the decision of *Re Peck, supra,* is not consistent with the best reasoning, and, therefore, should not establish an exception to the general rule of marshalling separate assets in such cases, but that the opinion in *Reynolds* v. *New York Trust Co., supra,* correctly states the law. Upon first sight it may seem possible to reconcile these two cases, the former involving a tort action for conversion while in the latter the tort is waived and action brought in assumpsit on *quasi* contract. It will readily be seen, however, that this distinction could not affect the conclusion. The decision of the point, which undoubtedly is the same in both cases, rests upon a question of legal rights,[13] and such rights should not be affected by the nature of the remedy.

PAROL CONTEMPORANEOUS "WAIVER" IN INSURANCE.—Perhaps no branch of law presents more hopeless confusion and conflict

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[8] Atlantic & Pacific R. *v.* Laird, 164 U. S. 393. See Sessions *v.* Johnson, 95 U. S. 347.

[9] Reynolds *v.* New York Trust Co., *supra.*

[10] Wilder *v.* Keeler, 3 Paige Ch. (N. Y.) 167, 23 Am. Dec. 781. See Re Gray, 111 N. Y. 404, 18 N. E. 719.

[11] Jackson *v.* Roberts, 83 Ga. 358, 9 S. E. 671.

[12] Mason *v.* Eldred, 6 Wall. 231.

[13] See Reynolds *v.* Trust Co., *supra,* where it is said, "* * * we think that 'this is a question concerning the nature of legal rights.' The creditor's legal right was to make the claim joint or several."